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16 UNITED STATES DISTRICT COURT

17 IN AND FOR THE DISTRICT OF NEVADA

18 JANET SOBEL, DANIEL DUGAN,
19 Ph.D., LYDIA LEE, and MARK SINGER,
20 individually and on behalf of all others
21 similarly situated,

22 Plaintiffs,

23 v.

24 THE HERTZ CORPORATION, a
25 Delaware corporation, ENTERPRISE
26 LEASING COMPANY-WEST, LLC, a
27 Delaware limited liability company, and
28 VANGUARD CAR RENTAL USA, LLC,
a Delaware limited liability company,

Defendants.

Case No. 3:06-CV-00545-LRH-RAM

**DEFENDANTS ENTERPRISE LEASING
COMPANY-WEST, LLC AND
VANGUARD CAR RENTAL USA, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
SETTLEMENT**

Date: May 17, 2011

Time: 10:00 a.m.

Place: Courtroom No. 5

Judge: Hon. Larry R. Hicks

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I. INTRODUCTION

In November 2010, the Court preliminarily approved the Settlement in this action, finding that it was “arrived at through arm’s length negotiations by highly experienced counsel after four years of litigation and after extended mediation” and that its terms “fall within the range of acceptable settlements.” 11/23/10 Order Granting Plaintiffs’ Motion for Preliminary Approval of Settlement and Approval of the Form of Notice ¶ 1 (Dkt No. 136 at 2:8-11). The Court’s preliminary analysis of the Settlement is correct, and Enterprise and Vanguard¹ respectfully join Plaintiffs’ request that the Court grant final approval of the Settlement.

The factors articulated by the Ninth Circuit in assessing whether a settlement is fair, adequate and reasonable favor approval of the Settlement in this case. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). In particular, “the strength of plaintiffs’ case,” “the risk, expense, complexity and likely duration of further litigation,” “the amount offered in settlement” and the “reaction of the class members to the proposed settlement” strongly support approval of the Settlement. *Id.*

First, Plaintiffs correctly acknowledge that their claims in this action come with no guarantee of success. Enterprise and Vanguard have strong defenses to Plaintiffs’ claim that they violated N.R.S. § 482.31575 by separately stating and charging an “airport concession recovery fee.” Also, Plaintiffs will not be able to prove both causation and actual damages necessary to obtain any monetary recovery. Similarly, any request for restitution or other equitable relief would fail since Plaintiffs will not be able to establish that Enterprise and Vanguard obtained any unjust enrichment or received any ill-gotten gains. Thus, the weakness of Plaintiffs’ case and the risk and expense of further litigation both favor approval of the Settlement.

Second, the Settlement provides fair and reasonable benefits to the Settlement Class Members given the substantial risks Plaintiffs and the class would face if litigation continues. As explained in Plaintiffs’ Motion for Final Approval, the benefits available to class members under

¹ Unless otherwise noted, capitalized terms in this Memorandum have the meanings set forth in the Settlement Agreement.

1 the Settlement represent a substantial percentage of the amounts actually paid by renters for the
 2 allegedly improper airport fees. In the absence of this Settlement, Plaintiffs and the class would
 3 face a significant risk of achieving a far less favorable result.

4 Third, Defendants have successfully provided comprehensive notice of the Settlement to
 5 potential class members. The Defendants sent notices to 2,497,360 persons by standard mail and
 6 email, and so far, of those potential class members, fewer than 50 have filed objections to the
 7 Settlement – less than two thousandths of one percent (0.002%). The reaction of the class
 8 members, including the small number of objections submitted to date, supports approval of the
 9 Settlement.²

10 **II. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED**

11 Strong judicial policy in the Ninth Circuit favors the settlement of complex class action
 12 litigation. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). In
 13 determining whether to approve the proposed settlement, the “universally applied standard is
 14 whether the settlement is fundamentally fair, adequate and reasonable” in the sound discretion of
 15 the trial judge. *Id.* “It is the settlement taken as a whole, rather than the individual component
 16 parts, that must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026
 17 (9th Cir. 1998). The question is not whether the settlement “could be prettier, smarter, or
 18 snazzier,” but solely “whether it is fair, adequate and free from collusion.” *Id.* at 1027.

19 Among the reasons the Settlement in this case is fair, adequate and reasonable are:

- 20 • Plaintiffs face a substantial risk that they will achieve a far less favorable result
- 21 than is offered in this Settlement if the claims are fully litigated;
- 22 • The Settlement provides for an appropriate level of benefits to the Settlement
- 23 Class Members given the weakness of their claims;
- 24 • The parties have successfully provided notice of the Settlement and the reaction of
- 25 the class members favors final approval of the Settlement.

26
 27

 28 ² The deadline for submission of objections and exclusions is April 8, 2011.

A. Plaintiffs Face Significant Risks in Proceeding to Trial and Defendants Have Substantial Defenses to Plaintiffs' Claims as to Both Liability and Damages.

The "strength of plaintiffs' case" and the "risk, expense, complexity, and likely duration of further litigation" strongly favor approval of the Settlement. *Class Plaintiffs*, 955 F.2d at 1291. Enterprise and Vanguard have strong defenses to Plaintiffs' claims as to both liability and damages; therefore, Plaintiffs face a substantial risk that they would obtain no recovery from Enterprise or Vanguard on behalf of a class if this case is fully litigated.

1. Plaintiffs Must Establish Liability as to Enterprise and Vanguard.

Notwithstanding the Court's interpretation to the contrary, Enterprise and Vanguard have strong arguments that N.R.S. § 482.31575 permits rental car companies to separately quote and charge "any fees paid to airports," including airport concession recovery fees. *See* N.R.S. § 482.31575 (former version).³ This interpretation is consistent with the statutory scheme, legislative history, and the *failure* of subsequent proposed legislation to specifically prohibit the practice Plaintiffs challenge in this case.⁴

In addition, Enterprise and Vanguard have strong arguments that Plaintiffs' claims seeking recovery of the alleged improper airport concession fees are barred by the long-standing voluntary payment doctrine. Where money is voluntarily paid, with full knowledge of the facts, it cannot be recovered even if there was no obligation to make such a payment. *Randall v. County of Lyon*, 14 P. 583, 584 (Nev. 1887). Based upon policies favoring stability and certainty once funds have been transferred, the voluntary payment doctrine encourages the resolution of disputes

³ Effective October 1, 2009, the legislature amended the statute to clarify that the phrase "any fees paid to airports" includes, but is not limited to, "any concession fees which the short-term lessor pays to do business at an airport and which he charges to the short-term lessee." N.R.S. § 482.31575(1) (current version).

⁴ For example, in 1995, the legislature introduced a bill (SB 396) that would have amended N.R.S. § 482.31575 to specifically prohibit the practice by rental car companies of separately stating and charging airport concession fees by deleting the phrase "any fees paid to airports" from the statute. *See* SB 396 (1995). Because the amendment was clearly intended to effectuate a change in the law, it demonstrates that the statute as it existed at the time of the proposed legislation did *not* prohibit the practice of separately stating an airport concession fee. *See Natchez v. State*, 721 P.2d 361, 363 (Nev. 1986) (where "a doubtful interpretation of a former statute is rendered certain by subsequent legislation, it has been held that such amendment is persuasive evidence of the legislature's intention in the first statute").

without litigation by requiring the party contesting the payment to alert the payee of his or her concerns so that the situation can be rectified. *See Putnam v. Time Warner Cable of Southeastern Wis.*, 649 N.W.2d 626, 633 (Wis. 2002).

Finally, even if Plaintiffs could establish liability against Enterprise and Vanguard, Plaintiffs would have to survive independent, de novo review on appeal on each of the threshold issues in the case, including interpretation of N.R.S. § 482.31575 and application of the voluntary payment doctrine. *See Trustees of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 929 (9th Cir. 1986) (“Statutory interpretation is a question of law subject to de novo review.”); *Chris Albritton Const. Co., Inc. v. Pitney Bowes Inc.*, 304 F.3d 527, 529 (5th Cir. 2002) (application of the voluntary payment doctrine is a question of law subject to de novo review).

2. Plaintiffs Must Prove Causation and Actual Damages.

Plaintiffs could recover damages for violation of N.R.S. § 482.31575 only if they could demonstrate causation and actual injury. *See Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 784 P.2d 954, 955 (Nev. 1989) (“The party seeking damages has the burden of proving both the fact of damages and the amount thereof.”). To establish causation and actual injury, Plaintiffs would have to show that if the airport concession fee had been included in the base rate, they would not have rented a vehicle or would have rented it at a lower price. *See In re Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002) (denying recovery in Truth-in-Lending Act claim because plaintiff failed to show that she “would either have secured a better interest rate elsewhere, or foregone the loan completely”); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) (actual damage is sustained only “if a customer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction”).

Here, Plaintiffs would not be able to establish causation or actual damages because they would not be able to show any injury caused by the alleged deceptive practice. First, Plaintiffs would not be able to show that, if the airport concession fee had not been separately stated, the total rental rate would have been materially lower. Indeed, Enterprise and Vanguard would be prepared to show that separately stating the airport concession fee does not have any effect on the total price charged to renters. Second, given that all of the other major rental car companies at

1 Nevada airports also separately stated the fee, Plaintiffs would not be able to show that they
 2 would have engaged in a different or less-expensive transaction by renting from another rental car
 3 company. Accordingly, Plaintiffs would be unlikely to recover any monetary relief from
 4 Enterprise or Vanguard if the case goes forward.

5 **3. Plaintiffs Are Not Entitled to Restitution or Equitable Relief.**

6 Plaintiffs' claims for common law unjust enrichment and restitution would fail because
 7 Plaintiffs would not be able to prove that Enterprise and Vanguard received ill-gotten gains or
 8 were unjustly enriched through the collection of separately stated airport concession fees.⁵ *See*
 9 *Mertens v. Hewitt Assoc.*, 948 F.2d 607, 612 (9th Cir. 1991) (restitution is not available where
 10 unjust enrichment is not established); *Sheldon v. American States Preferred Ins. Co.*, 95 P.3d 391,
 11 392 (Wash. Ct. App. 2004) ("we cannot agree with [plaintiffs'] contention that a violation causing
 12 no harm to policyholders must result in forfeiture of an otherwise legal and reasonable fee").

13 Moreover, this Court specifically found that the statute was "an ambiguous and poorly-
 14 drafted statute that is capable of being understood in two or more senses." 9/13/07 Order
 15 (Dkt No. 22 at 3:18-19). Given the ambiguity in the language of N.R.S. § 482.31575 and the way
 16 it was interpreted by all concerned for many years, any award of monetary relief, restitution, or
 17 other equitable relief against Enterprise and Vanguard would violate their due process rights. *See*
 18 *In re T.R.*, 80 P.3d 1276, 1280 (Nev. 2003) (where a statute is unduly vague, enforcement of the
 19 statute "violates the first essential of due process of law"). Here, N.R.S. § 482.31575 was
 20 unconstitutionally vague because it did not adequately define the term "any fees paid to airports"
 21 and did not give the Defendants a sufficiently definite warning as to the proscribed conduct.

22 **B. The Benefits Available to the Settlement Class Members Are Fair and**
 23 **Reasonable Given the Weakness of Plaintiffs' Case.**

24 The "amount offered in settlement" also favors final approval of the Settlement. The
 25 Settlement provides each Settlement Class Member who registers either a \$10 certificate (for

26 ⁵ Plaintiffs' common law unjust enrichment claim also fails because such claim is
 27 inappropriate where there is an express written contract that governs the transaction. *See*
 28 *LeasePartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997).

1 Settlement Class Members who were charged an airport concession fee for one or two rentals
 2 from a given brand during the defined class period) or \$20 certificate (for Settlement Class
 3 Members who were charged an airport concession fee for three or more rentals from a given
 4 brand during the defined class period) to be used toward a future rental. *See* Settlement
 5 Agreement ¶ 2.2(b)-(d) [Ex. 1 to Plaintiffs' Motion for Preliminary Approval (Dkt No. 123-1)].

6 The registration process for Settlement Class Members is streamlined and straightforward:
 7 Settlement Class Members are directed to a website, www.nevadacarrentalsettlement.com, where
 8 Alamo, Enterprise and National renters simply enter their last name and the certificate registration
 9 number provided on the Settlement Class Notice.⁶ The Settlement Class Notice, as well as every
 10 page of the settlement web site, provides contact information for Plaintiffs' Counsel – names,
 11 addresses, telephone numbers and email addresses – should any Settlement Class Member
 12 encounter difficulty in registering for benefits. No other documentation is required, nor need any
 13 materials be submitted by mail. Defendants bear the cost of notice and administering the
 14 Settlement. Settlement Agreement ¶ 2.3.

15 As set forth in Plaintiffs' Motion for Final Approval, the value of the settlement benefits
 16 compares favorably to the actual amount of allegedly improper charges paid by Settlement Class
 17 Members for airport concession fees. *See* Plaintiffs' Motion for Final Approval at 6:4-9 (Dkt No.
 18 185). And Settlement Class Members can receive this value easily: registration for benefits takes
 19 only minutes, requires no burdensome paperwork or documentation, and imposes no costs or fees
 20 on the registrant – not even postage. The value will be received quickly (within months of final
 21 approval of the Settlement), Settlement Agreement ¶ 3.2, while any relief available from further
 22 litigation would be available only after what will likely be years of further proceedings. In
 23 addition, the settlement relief is structured in a manner that maximizes the value of the certificates
 24 to the Settlement Class Members. All the Settlement Class Members have rented vehicles and are

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 26 ⁶ The Alamo, Enterprise and National registration forms are available at:
 27 <http://nevadacarrentalsettlement.com/alamo/settlement-registration-form/>;
 28 <http://nevadacarrentalsettlement.com/enterprise/settlement-registration-form/>; and
<http://nevadacarrentalsettlement.com/national/settlement-registration-form/>.

likely to rent in the future, and the certificates are not restricted in use to Nevada airport locations – they can be redeemed at all rental locations of the issuing brand throughout the United States, and moreover they can be combined with any other discounts, sales, promotions or other offers from that brand. Settlement Agreement ¶ 2.2(e). The certificates can also be used by a Settlement Class Member’s parents, children, spouse or legally recognized domestic partner who lives at the Settlement Class Member’s address and are valid for 18 months. *Id.*

Given the substantial hurdles that Plaintiffs and the class must clear in order to recover any actual damages against Enterprise and Vanguard, the benefits available under the Settlement are fair and reasonable to the Settlement Class Members. See *Fleury v. Richemont North America, Inc.*, 2008 U.S. Dist. LEXIS 64521, *56-60 (N.D. Cal. July 3, 2008) (granting final approval of class action settlement because the benefits were not “inconsequential,” particularly given that “there are significant weaknesses to Plaintiffs’ claim” and their damages argument “would be difficult to make and . . . would ultimately prove less than substantial in dollar amount”).

C. Defendants Provided Comprehensive Notice of the Settlement and the Reaction of the Settlement Class Members Favors Approval.

Enterprise and Vanguard have fully and successfully complied with the notice plan approved by the Court and found to be “the best practicable means of providing notice under the circumstances.” 11/23/10 Order ¶ 5 (Dkt No. 136); *see also* Stipulation and Order re Form of Class Notice (Dkt No. 139). In particular, Enterprise and Vanguard sent notices by standard mail to a total of 1,279,466 potential class members for the Enterprise, Alamo, and National brands. *See* Declaration of Donald J. Andra ¶ 9 (Dkt No. 181). Hertz sent notices to 1,217,894 potential class members for the Hertz and Advantage brands. *See* Declaration of Jeffrey Gyomber Regarding Notice to Settlement Class Members ¶¶ 5-6 (Dkt No. 182).

As Plaintiffs’ Motion for Final Approval explains, out of the approximately 2.5 million total potential class members who received notice of the Settlement, to date, less than two

1 thousandths of one percent (0.002%) of class members have filed objections.⁷ See Plaintiffs'
2 Motion at 1:20-22. Where, as here, there is a very small percentage of objections, such response
3 supports approval of the settlement. See *Churchill Village, L.L.C. v. General Electric*, 361 F.3d
4 566, 577 (9th Cir. 2004) (affirming final approval of settlement where 45 of 90,000 notified class
5 members objected).

6 III. CONCLUSION

7 For all the foregoing reasons, the Settlement is fair, reasonable and adequate for the
8 Settlement Class Members, and Enterprise and Vanguard respectfully request that the Court grant
9 final approval of the Settlement.

10 Dated: April 4, 2011

BOWEN HALL OHLSON & OSBOURNE

11
12 Dan C. Bowen
13 Attorneys for Defendants
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14 Vanguard Car Rental USA, LLC

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27 ⁷ Pursuant to the Court's Order, Enterprise and Vanguard will file their responses to the
28 objections made by Settlement Class Members on or before April 28, 2011.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b) and Local Rule 5-4, I hereby certify that I am an employee of BOWEN HALL, over the age of eighteen, and not a party to the within action. I further certify that on the 4th day of April, 2011, I electronically filed the foregoing and thus, pursuant to LR 5-4, caused same to be served by electronic mail on the following Filing Users:

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22
 23 /s/ Molly Reid
 24 Molly Reid

25 SFACTIVE-129055.0002097/902275336.1